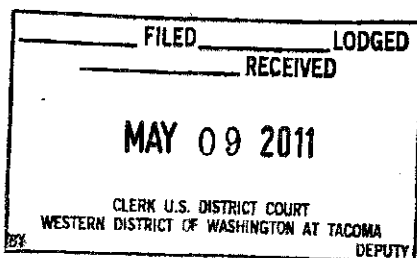


The Honorable Benjamin ^{H.} 8. Settle



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD MARSCHALL,

Defendant.

NO. CR11-5222BHS

PLEA AGREEMENT

The United States of America, by and through Jenny A. Durkan, United States Attorney for the Western District of Washington, and Nicholas W. Brown, Assistant United States Attorney for said District, Defendant, RICHARD MARSCHALL, and Defendant's attorney, Kenneth Kagan, enter into the following Agreement, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B):

1. Waiver of Indictment. Defendant, having been advised of the right to be charged by Indictment, agrees to waive that right and enter a plea of guilty to the charge brought by the United States Attorney in an Information.

2. The Charge. Defendant, having been advised of the right to have this matter tried before a jury, agrees to waive that right and enter a plea of guilty to the following charge contained in the Information: Causing the Introduction of Misbranded Drugs, as charged in Count One, in violation of Title 21, United States Code, Sections 331(a) and 333(a)(2).

1 By entering this plea of guilty, Defendant hereby waives all objections to the form
2 of the charging document. Defendant further understands that before entering Defendant's
3 plea of guilty, Defendant will be placed under oath. Any statement given by Defendant
4 under oath may be used by the United States in a prosecution for perjury or false
5 statement.

6 2. Elements of the Offense. The elements of the offense of Causing the
7 Introduction of Misbranded Drugs, as charged in Count 1 of the Information, are as
8 follows:

- 9 a. First, the Defendant knowingly caused the introduction into interstate
10 commerce of certain drugs;
11 b. Second, the drugs were misbranded; and
12 c. Third, the Defendant caused the introduction with the intent to
13 deceive.

14 3. Penalties. Defendant understands that the statutory penalties for the offense
15 Causing the Introduction of Misbranded Drugs, as charged in Count 1, are as follows:

16 Imprisonment for up to three (3) years, a fine of up to ten thousand dollars
17 (\$10,000.00), a period of supervision following release from prison of up to one (1) year,
18 and a one hundred dollar (\$100.00) penalty assessment.

19 Defendant agrees that the penalty assessment shall be paid at or before the time of
20 sentencing. Defendant agrees that any monetary penalty the Court imposes, including the
21 penalty assessment, fine, costs or restitution, is due and payable immediately, and further
22 agrees to submit a completed Financial Statement of Debtor form as requested by the
23 United States Attorney's Office.

24 Defendant understands that supervised release is a period of time following
25 imprisonment during which he will be subject to certain restrictions and requirements.
26 Defendant further understands that if supervised release is imposed and he violates one or
27 more of its conditions, he could be returned to prison for all or part of the term of
28

1 supervised release that was originally imposed. This could result in Defendant serving a
2 total term of imprisonment greater than the statutory maximum stated above.

3 4. Rights Waived by Pleading Guilty. Defendant understands that by pleading
4 guilty, Defendant knowingly and voluntarily waives the following rights:

5 a. The right to plead not guilty and to persist in a plea of not guilty;

6 b. The right to a speedy and public trial before a jury of Defendant's
7 peers;

8 c. The right to the effective assistance of counsel at trial, including, if
9 Defendant could not afford an attorney, the right to have the Court appoint one for
10 Defendant;

11 d. The right to be presumed innocent until guilt has been established
12 beyond a reasonable doubt at trial;

13 e. The right to confront and cross-examine witnesses against Defendant
14 at trial;

15 f. The right to compel or subpoena witnesses to appear on Defendant's
16 behalf at trial;

17 g. The right to testify or to remain silent at trial, at which trial such
18 silence could not be used against Defendant; and

19 h. The right to appeal a finding of guilt or any pretrial rulings.

20 5. United States Sentencing Guidelines. Defendant understands and
21 acknowledges that, at sentencing, the Court must consider the sentencing range calculated
22 under the United States Sentencing Guidelines, together with the other factors set forth in
23 Title 18, United States Code, Section 3553(a), including: (1) the nature and circumstances
24 of the offenses; (2) the history and characteristics of the Defendant; (3) the need for the
25 sentence to reflect the seriousness of the offense, to promote respect for the law, and to
26 provide just punishment for the offense; (4) the need for the sentence to afford adequate
27 deterrence to criminal conduct; (5) the need for the sentence to protect the public from
28 further crimes of the Defendant; (6) the need to provide the Defendant with educational

1 and vocational training, medical care, or other correctional treatment in the most effective
 2 manner; (7) the kinds of sentences available; (8) the need to provide restitution to victims;
 3 and (9) the need to avoid unwarranted sentence disparity among Defendants involved in
 4 similar conduct who have similar records. Accordingly, Defendant understands and
 5 acknowledges that:

6 a. The Court will determine Defendant's applicable Sentencing
 7 Guidelines range at the time of sentencing;

8 b. After consideration of the Sentencing Guidelines and the factors in 18
 9 U.S.C. 3553(a), the Court may impose any sentence authorized by law, up to the maximum
 10 term authorized by law;

11 c. The Court is not bound by any recommendation regarding the
 12 sentence to be imposed, or by any calculation or estimation of the Sentencing Guidelines
 13 range offered by the parties or the United States Probation Department, or by any
 14 stipulations or agreements between the parties in this Plea Agreement; and

15 d. Defendant may not withdraw a guilty plea solely because of the
 16 sentence imposed by the Court.

17 6. Ultimate Sentence. Defendant acknowledges that no one has promised or
 18 guaranteed what sentence the Court will impose.

19 7. Statement of Facts. The parties agree on the following facts in support of
 20 Defendant's plea of guilty and sentencing. Defendant admits he is guilty of the charged
 21 offense.

22 a. The Defendant, Dr. Richard MARSCHALL is a licensed naturopathic
 23 physician who runs a practice in Port Angeles, Washington.

24 b. In February 2009, the Food and Drug Administration (FDA) began
 25 investigating the Defendant after it ^{impounded} ~~seized~~ ^{KSLC Rm} a parcel addressed to his practice in
 26 Washington. The package contained ^{NB} multiple boxes of Human Chorionic Gonadotropin
 27 (HCG) - a drug approved for use in treating infertility - that was manufactured in China
 28 and distributed by a company in India. The FDA gave the Defendant notice that it had

1 ^{impounded Rm} seized the drugs because they appeared to be "misbranded" under the FDA laws, citing the
 2 relevant statutes. The Defendant replied by sending an email stating that he was an
 3 "endocrinologist" and used HCG to treat infertile patients. However, the Defendant was
 4 not a licensed endocrinologist. The package was not released. The Defendant
 5 acknowledges that the HCG was misbranded.

6 c. In June 2009, the FDA ^{impounded Rm KSK} seized a second package of HCG from India
 7 intended for Marschall. The FDA gave Marschall notice that the drugs were unapproved
 8 new drugs, again citing the relevant FDA laws. Marschall responded that he needed the
 9 drugs to treat "certain patients." The package was not released. The Defendant
 10 acknowledges that the HCG was misbranded.

11 d. In July 2009, the FDA conducted a trash search of the Defendant's
 12 clinic and discovered HCG identical to that ^{impounded Rm KSK} seized in February 2009. In January 2010, the
 13 FDA conducted another trash search and found HCG that had been mailed to him from
 14 Florida.

15 e. In March 2010, the FDA executed a federal search warrant at the
 16 Defendant's business and seized numerous patient records. During the search, the
 17 Defendant agreed to be interviewed. He acknowledged that he was prescribing HCG for
 18 weight loss purposes and ^{had purchased} was purchasing the drug from a Canadian website. He further
 19 admitted that he knew the drugs came from India. He then admitted that he had lied in his
 20 February 2009 email to the FDA in which he claimed that he needed HCG to treat infertile
 21 patients. He further acknowledged that he had never treated any patients for infertility
 22 with HCG.

23 f. The FDA subsequently interviewed multiple former patients of the
 24 Defendant that had been prescribed HCG. Each of the patients had been prescribed the
 25 drug as part of a weight loss regimen, rather than to treat infertility. Many of the patients
 26 never met the Defendant in person, but only had telephone consultations with him.

27 g. In August 2010, the Defendant was again interviewed by the FDA.
 28 First, he acknowledged that he was still treating many patients over the telephone. Then

1 he stated that when he was purchasing HCG from a Canadian website, he "did order
 2 illegally for that short period of time." The Defendant further admitted to lying to the
 3 Inspector in 2009 to try to convince her to release the package, stating that "I was distracting
 4 her. I was diverting her."

5 h. The Defendant acknowledges that all of the HCG ^{impounded} seized by the FDA ^{in February 2009}
 6 were ordered by the Defendant from a Canadian website, and that he thereby caused the ^{and June 2009}
 7 introduction of the drug into interstate commerce. The Defendant further acknowledges
 8 that the drugs were misbranded, in that they lacked adequate directions for use and were
 9 not exempt from that requirement. The Defendant acknowledges that he caused the
 10 introduction of these misbranded drugs with the intent to deceive.

11 8. Sentencing Factors The parties agree and stipulate that the following
 12 Sentencing Guidelines provisions apply to this case: A base offense level of 6, pursuant to
 13 USSG § 2N2.1.

14 The parties agree they are free to argue the application of any other provisions of
 15 the United States Sentencing Guidelines. Defendant understands, however, that at the
 16 time of sentencing, the Court is free to reject these stipulated adjustments, and is further
 17 free to apply additional downward or upward adjustments in determining Defendant's
 18 Sentencing Guidelines range.

19 9. Non-Prosecution of Additional Offenses. As part of this Plea Agreement,
 20 the United States Attorney's Office for the Western District of Washington agrees not to
 21 prosecute Defendant for any additional offenses known to it as of the time of this
 22 Agreement that are based upon evidence in its possession at this time, or that arise out of
 23 the conduct giving rise to this investigation. In this regard, Defendant recognizes the
 24 United States has agreed not to prosecute all of the criminal charges the evidence
 25 establishes were committed by Defendant solely because of the promises made by
 26 Defendant in this Agreement. Defendant agrees, however, that for purposes of preparing
 27 the Presentence Report, the United States Attorney's Office will provide the United States
 28 Probation Office with evidence of all conduct committed by Defendant.

1 10. Sentencing Recommendation. The United States agrees that it will advocate
2 for a sentence of probation. The government is free to make any argument it deems
3 appropriate regarding other portions of defendant's sentence, including the conditions of
4 release, fines, and restitution.

5 Defendant is free to recommend any sentence. Defendant understands that neither
6 the Court nor the probation office are bound to follow the parties' recommendations
7 regarding sentencing, and that the Court is free to impose any sentence up to and including
8 the statutory maximum.

9 11. Acceptance of Responsibility. The United States acknowledges that if
10 Defendant qualifies for an acceptance of responsibility adjustment pursuant to U.S.S.G.
11 Section 3E1.1(a), his total offense level should be decreased by two (2) levels because
12 Defendant has clearly demonstrated acceptance of responsibility for Defendant's offense.

13 12. Breach, Waiver, and Post-Plea Conduct. Defendant agrees that if Defendant
14 breaches this Plea Agreement, the United States may withdraw from this Plea Agreement
15 and Defendant may be prosecuted for all offenses for which the United States has
16 evidence. Defendant agrees not to oppose any steps taken by the United States to nullify
17 this Plea Agreement, including the filing of a motion to withdraw from the Plea
18 Agreement. Defendant also agrees that if Defendant is in breach of this Plea Agreement,
19 Defendant has waived any objection to the reinstitution of any charges in the Indictment
20 that were previously dismissed or any additional charges that had not been prosecuted.

21 Defendant further understands that if, after the date of this Agreement, Defendant
22 should engage in illegal conduct, or conduct that is in violation of Defendant's conditions
23 of release or confinement (examples of which include, but are not limited to: obstruction
24 of justice, failure to appear for a court proceeding, criminal conduct while pending
25 sentencing, and false statements to law enforcement agents, the Pretrial Services Officer,
26 Probation Officer or Court), the United States is free under this Agreement to file
27 additional charges against Defendant or to seek a sentence that takes such conduct into
28 consideration. Such a sentence could include a sentencing enhancement under the United

1 States Sentencing Guidelines or an upward departure from the applicable sentencing
2 guidelines range.

3 13. Waiver of Appeal As part of this Plea Agreement and on the condition that
4 the Court imposes a custodial sentence that is within or below the Sentencing Guidelines
5 range that is determined by the Court at the time of sentencing, Defendant waives to the
6 full extent of the law:

- 7 a. any right conferred by Title 18, United States Code, Section 3742 to appeal
8 the sentence, including any restitution order imposed; and
9 b. any right to bring a collateral attack against the conviction and sentence,
10 including any restitution order imposed, except as it may relate to the
11 effectiveness of legal representation.

12 Furthermore, this waiver does not preclude Defendant from bringing an appropriate
13 motion pursuant to 28 U.S.C. 2241, to address the conditions of Defendant's
14 confinement or decisions of the Bureau of Prisons regarding the execution of Defendant's
15 sentence.

16 If Defendant breaches this Plea Agreement at any time by appealing or collaterally
17 attacking (except as to effectiveness of legal representation) the conviction or sentence in
18 any way, the United States may prosecute Defendant for any counts, including those with
19 mandatory minimum sentences, that were dismissed or not charged pursuant to this Plea
20 Agreement.

21 14. Voluntariness of Plea. Defendant agrees that Defendant has entered into this
22 Plea Agreement freely and voluntarily, and that no threats or promises, other than the
23 promises contained in this Plea Agreement, were made to induce Defendant to enter this
24 plea of guilty.

25 15. Statute of Limitations. In the event this Agreement is not accepted by the
26 Court for any reason, or Defendant has breached any of the terms of this Plea Agreement,
27 the statute of limitations shall be deemed to have been tolled from the date of the Plea
28 Agreement to: (1) 30 days following the date of non-acceptance of the Plea Agreement by

1 the Court; or (2) 30 days following the date on which a breach of the Plea Agreement by
2 Defendant is discovered by the United States Attorney's Office.

3 16. Completeness of Agreement. The United States and Defendant
4 acknowledge that these terms constitute the entire Plea Agreement between the parties.
5 This Agreement binds only the United States Attorney's Office for the Western District of
6 Washington. It does not bind any other United States Attorney's Office or any other office
7 or agency of the United States, or any state or local prosecutor.

8
9 Dated this 9th day of May, 2011.

10 
11 RICHARD MARSCHALL
12 Defendant

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15 KENNETH KAGAN
16 Attorney for Defendant

17 
18 TODD GREENBERG
19 Assistant United States Attorney

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21 NICHOLAS W. BROWN
22 Assistant United States Attorney
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